# BEFORE THE STATE OF WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2002-01

BP WEST COAST PRODUCTS, LLC.

PREHEARING ORDER NO.1 COUNCIL ORDER NO.773 PREHEARING ORDER: GRANTING, ON CONDITION, PETITIONS FOR INTERVENTION; AND ADOPTING HEARING GUIDELINES

BP CHERRY POINT COGENERATION PROJECT

## **Nature of the Proceedings**

On June 10, 2002, BP West Coast Products, LLC (herein "BP" or the "Applicant), submitted application No. 2002-01 to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) to construct and operate the BP Cherry Point Cogeneration Project, a 720-megawatt natural gas-fired combustion turbine electrical cogeneration facility. The proposed BP Cherry Point Cogeneration Project is to be located within Whatcom County, adjacent to the BP oil refinery and near the community of Birch Bay.

Associated with the Project will be an approximately one mile electrical transmission line and a 1,400-foot natural gas pipeline. The siting of the transmission line is under the jurisdiction of the Bonneville Power Administration (BPA).

EFSEC and BPA are conducting an environmental review of this Project and will be issuing a draft Environmental Impact Statement (DEIS) for public comment under the Washington State Environmental Policy Act (SEPA), and the National Environmental Policy Act (NEPA). EFSEC will also conduct an examination of the project through a formal adjudicative proceeding and a land use consistency hearing to determine whether the proposed facility is consistent and in compliance with county or regional land use plans and zoning ordinances.

## **Procedural Setting:**

As noted, on June 10, 2002, BP submitted Application No. 2001-02 to the Council to construct and operate the BP Cherry Point Cogeneration Project (herein the "Project"). On September 18, 2002, the Council issued a Notice of Intent to Hold Adjudicative Proceeding and Notice of Opportunity and Deadline to File Petitions for Intervention by October 22, 2002, Applicant's Objections or Response by October 29, 2002, and Notice of Intent to Hold Prehearing Conference on November 5, 2002, with parties replies to the responses of Applicant to Petitions for Intervention to be submitted orally at the first prehearing conference.

The Council convened the first prehearing conference in the adjudication on November 5, 2002, in Lacey, WA, pursuant to due and proper notice to all appropriate persons. The Conference was

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held before Council Chair Jim Luce, and Council members: Richard Fryhling (Department of Community, Trade & Economic Development), Charles Carelli (Department of Ecology), Jenene Fenton (Department of Fish & Wildlife), Tony Ifie (Department of Natural Resources), Tim Sweeney (Utilities and Transportation Commission), Dan McShane (Whatcom County) and the Administrative Law Judge, Julian C. Dewell.

## **Participants:**

The following persons participated in the prehearing conference:

Applicant: BP WEST COAST PRODUCTS, LLC,

by Karen M. McGaffey, Attorney at Law,

Seattle.

Counsel for the Environment: Michael Lufkin, Assistant Attorney General

(AAG), Olympia.

Council Member Agencies: Washington Utilities and Transportation

Commission by Sally G. Johnston, Senior

AAG, Olympia.

Petitioners for Intervention: Whatcom County, by David M. Grant,

Deputy Prosecuting Attorney, Bellingham.

The Province of British Columbia, by David

A. Bricklin, Attorney at Law, Seattle.

# Parties in EFSEC adjudicative proceedings:

Pursuant to WAC 463-30-060 and 463-30-050, parties to the adjudicative portion of an EFSEC proceeding include:

- The Applicant, in this case BP WEST COAST PRODUCTS, LLC;
- Each member agency as defined in RCW 80.50.030(3)<sup>1</sup>; in this case, the Washington Utilities and Transportation Commission;
- The "counsel for the environment" as defined in RCW 80.50.020(12); in this case Assistant Attorney General Michael Lufkin;
- Each person admitted to the adjudicative proceeding as an "intervenor", but such party is only a party for the purposes, and subject to any limitations and conditions, specified in this council order.

<sup>1</sup>RCW 80.50.030(3) provides that the council shall consist of the directors, administrators or their designees of the following departments, agencies, commissions and committees: the departments of ecology; fish and wildlife, health, military, community, trade, and economic development, natural resources, agriculture, transportation, and the utilities and transportation commission. In addition, RCW 80.50.030(4) provides that the county legislative authority of the county where an application for a proposed site is located shall appoint a voting member to the Council during the consideration of that site. RCW 80.50.030(6) provides that the Port District wherein an applicant for a proposed port facility is filed under the authority of the Council shall appoint a member or designee as a nonvoting member of the Council while the Council considers the proposed site.

## 1. Rulings and Background on Intervention

#### a. Laws on intervention in EFSEC adjudicative proceedings

The laws controlling the intervention of parties in EFSEC adjudicative proceedings are contained in the Washington Administrative Procedures Act (APA) RCW Ch. 34.05, at RCW 34.05.443, and in the Rules on Siting Energy Facilities at WAC 463-30-400 and 410.

RCW 34.05.443, the part of the APA which addresses intervention, provides:

- (1) The presiding officer may grant a petition for intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.
- (2) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:
  - (a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; and
  - (b) Limiting the intervenor's use of discovery, cross-examination, and procedures so as to promote the orderly and prompt conduct of the proceedings; and
  - (c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.
- (3) The presiding officer shall timely grant or deny each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of the decision granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

The Washington Administrative Code's Rules on Siting Energy Facilities at WAC 463-30-400 and 410 provide:

**Intervention.** On timely application in writing to the council, intervention shall be allowed to any person upon whom a statute confers a right to intervene and, in the discretion of the council, to any person having an interest in the subject matter and whose ability to protect such interest may be otherwise impaired or impeded. All petitions to intervene shall be verified under oath by the petitioner, shall adequately identify the petitioner, and shall establish with particularity an interest in the subject matter and that the ability to protect such interest may be otherwise impaired or impeded. In exercising discretion with regard to intervention, the council shall consider whether intervention by the petitioner would unduly delay the proceeding or prejudice the rights of the existing parties. The council may establish a date after which petitions to intervene will not be

considered except for good cause shown. When such a date has been established, the council will assure that adequate public notice is given.

**Participation by intervenor.** In general, it is the policy of the council to allow any intervenor broad procedural latitude. To the extent that the council determines that numerous intervenors might unduly delay the proceedings or prejudice the rights of existing parties, intervenor status may be conditioned upon assent by the prospective intervenor and counsel for the environment to allow the counsel for the environment to act as lead counsel for the balance of the hearing, where the intervenor's interests more closely align with those of the counsel for the environment. Intervenor status may also be conditioned upon allowance of other parties to act as lead parties, where appropriate. The council reserves the right to prescribe other limitations and conditions, where appropriate.

## b. General principles for participation in EFSEC adjudicative proceedings

The Council is committed to providing an appropriate forum for all persons and entities to provide their views and expertise to the Council. Effective participation from all of the petitioners for intervention is encouraged. In individual cases, the most appropriate forum may be the formal adjudicative hearings with party status and responsibilities. In other instances appropriate participation may be as a witness for the Counsel for the Environment or another party to the hearings, participation in the public hearings provided for in WAC 463-14-030 and RCW 80.50.090, in the land use law consistency and compliance hearings to be held in Whatcom County, or by submitting written comments for the Council's consideration.

In addition to persons participating and communicating to the Council as parties to the proceedings, the law at RCW 80.50.090(3) also provides that, prior to the Council making any recommendation to the governor on a site application, the Council will conduct a public hearing as an adjudicative proceeding under the APA, chapter 34.05. At that hearing, any person is entitled to be heard in support of, or in opposition to, the application for certification. WAC 80.50.090(3); WAC 463-14-030. Such public hearing will be scheduled later in this proceeding at a time and date to be determined by the Council.

#### c. Identification of parties and rulings on specific petitions for intervention

The Council has considered all of the petitions for intervention and pleadings of Counsel for the Environment, the Washington Utilities and Transportation Commission, Whatcom County, the Province of British Columbia, the Applicant's Response to Petitions for Intervention to the petitions for intervention, the oral responses of all of the petitioners for intervention and Counsel for the Environment and the Washington Utilities and Transportation Commission, the Applicant's response and any rebuttal. Having considered the foregoing, given consideration to the statutes and rules on intervention and the above described principles of intervention, the Council makes the following decisions regarding parties to the adjudicative proceedings:

Applicant BP WEST COAST PRODUCTS, LLC.: under WAC 463-30-060 and RCW 80.50.020, the Applicant, who applies for a site certification, is a party as a matter of right to the adjudicative proceedings.

<u>Counsel for the Environment</u>: the Counsel for the Environment is an assistant attorney general appointed by the Attorney General and represents the public and its interest in protecting the quality of the environment. Michael Lufkin has been duly appointed by the Attorney General and is a party as a matter of right, for all purposes, pursuant to WAC 463-30-060.

Washington State Utilities and Transportation Commission: has a representative on EFSEC and is entitled to party status in the Council's adjudicative proceedings as a matter of right. WAC 463-30-050. Washington State Utilities and Transportation Commission (WUTC herein), pursuant to RCW 80.50.030(3), is therefore a party. WUTC will be limited to issues of safety and concerns about design, construction, operation and maintenance in compliance with state and federal rules, regulations and statutes, as such issues generally fall within the WUTC's jurisdiction in Washington State.

Whatcom County: The Council finds that the county in which the proposed plant is located has shown the legal criteria for intervention, except as hereinafter set forth, and is granted party status pursuant to WAC 463-30-060(4), limited to issues which directly affect Whatcom County.

British Columbia: The Council finds that The Province of British Columbia (herein after the "Province") has shown the legal criteria for intervention, other than supporting its Petition with a verification by the Petitioner, and is granted party status pursuant to WAC 463-30-060(4), subject to the following limitations, to wit: The Province is hereby required to file, no later than December 31, 2002, a verification under oath by Petitioner, as specified in WAC 463-30-400, to be incorporated into its Motion to Intervene, after which the Province will be authorized to participate as an Intervenor in these proceedings, limited to: 1. The proposed cogeneration plant's potential to adversely impact air quality within British Columbia, as these issues are outlined in the Province's Motion, excluding back-up fuel system and diesel fuel, which are not issues in this proceeding, under the current BP Application for Site Certification, and 2. The issue of wastewater and surface water discharge impacts on salmonid and herring populations as this issue may relate to British Columbia, as these issues are outlined in the Province's Motion.

#### 2. Stipulations and Settlements:

The Council expressed a strong desire that all parties and intervenors consider entering into settlements and stipulations with the Applicant. WAC 463-30-250. To that end, the Council offered to facilitate settlements and stipulations by providing to parties to the adjudication, upon

request, the names of qualified mediators, and to procedurally accommodate the hearing of settlements and stipulations as quickly as possible.

As in past practice, the Council will consider approving stipulations between two or more parties as to be agreed upon facts or minimum levels or measures for mitigation, provided the stipulating parties provide substantial evidence supporting the agreement. Approved stipulations are binding only upon stipulating parties.

The Council requires that any parties who come to such agreements present copies of their settlements and stipulations, and any supporting documents, to the Council a minimum of 10 business days prior to a scheduled settlement hearing date. The Council requests that it be notified no less than 10 business days in advance of any settlements or stipulation agreement presentations at scheduled prehearing conferences.

#### 3. Scheduling and Next scheduled prehearing conference:

The Council will not set a Second Prehearing Conference at this time, in light of delays in the timing of issuance of the DEIS. At such time as an accurate date can be ascertained for issuing the DEIS, the Council will schedule the Second Prehearing Conference to include progress on stipulation and agreement discussions, the issues list, any discovery issues, and the hearing schedule. Further, there will be an opportunity for evidentiary hearings on any stipulations or agreements that were submitted for Council's approval at least 10 days prior to the Second Prehearing Conference.

## 4. Issue Identification:

The Council has requested that an issue list be developed to clarify the issues to be adjudicated. The Counsel for the Environment has submitted a list of issues in his Appearance herein. The parties were encouraged to meet and come to agreement on an issues list prior to the Second Prehearing Conference. The Counsel for the Environment agreed to coordinate an effort between the parties to develop the issues list. All parties were advised to communicate with Mr. Michael Lufkin regarding the issues, which they would like to see, addressed in the adjudicative proceeding. In addition, Whatcom County, and the Province shall identify all issues affecting their jurisdictions with particularity. Issues raised may be subject to a dispositive motion, at the election of the Applicant.

This matter will be discussed at the Second Prehearing Conference and thereat finalized; provided however, since the DEIS has not been issued by the Council, the issue list will be subject to additions and supplementation as provided by the process for late intervention in the Council's Notice of Deadline for Submitting Petitions for Intervention (Late Intervention for Good cause Shown).

#### 5. Miscellaneous matters

# **Hearing Guidelines**:

On October 23, 2002, in connection with hearing matters herein, the Council distributed draft Hearing Guidelines for the conduct of the hearing to assist parties in understanding the Council's expectations and to show how it will manage the adjudicative hearing. None of the parties or intervenors objected to the draft Hearing Guidelines. The Council hereby adopts for this proceeding the Hearing Guidelines which were sent to the parties on October 23, 2002, and which are attached as Appendix A. The Council reserves the authority to vary from these guidelines when there is good cause to do so. The Council expects all parties and intervenors to be familiar with and comply with the guidelines.

The Council clarified that appearance by telephone at future prehearing conferences would only be allowed under special circumstances. Parties wishing to appear by telephone must request permission from the Council Manager in advance.

EFSEC Staff explained and distributed copies of certificates of services and the allowable format and the service list and requirements for electronic documents. Further, a presentation was made concerning Official Notice, under RCW 34.05.457 (5) and WAC 463-30-230 and 240 and counsel was advised to be alert to these requirements.

A revised service list in attached to this order as Appendix B.

#### **Discovery**:

The parties were encouraged to conduct informal discovery. The Council will hear progress reports on the status of discovery at its Second Prehearing Conference.

#### **Notice to parties:**

Any objection to the provisions of this order must be filed within ten days after the date of service of this order, pursuant to WAC 463-30-270(3). Unless modified, this prehearing conference order shall control further proceedings in this Docket.

DATED at Olympia, Washington and effective this	sday of December, 2002.
WASHINGTON STATE ENERGY FACILITY SI	TE EVALUATION COUNCIL
	Ву
	Julian C. Dewell Administrative Law Judge